

A Yii Ming Sung v Sarawak Securities Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12-13 OF 2000
IAN CHIN J
12 JULY 2000

B *Securities — Stockbroker — Negligence — Whether breach of trust if no rules of trading broken — Whether grounds for summary judgment*

C The respondent claimed against the appellant for trading losses and interest incurred by the appellant in a share margin financing facility with the respondent. The appellant claimed that the respondent had breached the fiduciary duty owed by the respondent to the appellant. The appellant argued that the respondent had failed to give a breakdown of the trading and prices which had resulted in the shortfall and thus the appellant did not know how the sum claimed had been incurred. The appellant further argued that as he also had a trading account as well as a margin account, the respondent had failed to comply with KLSE Circular No 713 and the Rules of Trading on Margin Accounts which applied to the appellant. The respondent had failed to liquidate the margin when the equity fell below 130%. The respondent had also fixed the value of the equity at 50% of the market value as opposed to a value based on the last done price on the preceding day. The appellant claimed the sheer number of affidavits filed showed that this was not a straightforward case for summary judgment. The lower court gave summary judgment for the respondent. The appellant appealed.

F Held, dismissing the appeal:

- G** (1) The respondent had exhibited a set of margin client analysis report which set out how the figures were derived and through what share transactions, including the imposition of interest (see p 61C–D). Even assuming the ignorance of the appellant could be a defence, the exhibits established the transactions and shortfall and should leave no doubt as to how the appellant ended up owing the monies claimed (see p 61G).
- H** (2) The ‘unpaid shortfall incurred as a result of trading in various shares and stocks’ is no different from ‘having defaulted in reimbursing the respondent for payments advanced in the purchase of various shares which were subsequently disposed of. Both expressed the same thing in different ways (see p 61D–F).
- I** (3) The respondent was suing the appellant not on the trading account but on the margin account and thus Circular No 713 had no application (see p 62A). Rule 20(15) of the Rules of Trading gave the respondent an absolute discretion whether to force-sell or not. Thus a failure to liquidate cannot be a defence to the claim (see p 62F–I).

- (4) Merely pleading a contravention of the rules would not be a defence unless it is also pleaded that the contravention rendered the agreement illegal and the shortfall irrecoverable. The appellant's argument however is merely that the infringement of the rules resulted in his suffering heavy contra losses (see pp 62I-63B). **A**
- (5) Rule 20(12) and (13) require a client to 'top up a shortfall so as to bring the equity to not less than 150% of the outstanding balance'. If it was not unlawful for the respondent to provide a higher percentage for the equity, then it did not matter that the shares had been given a depressed value since the same result would obtain (see p 64D-E). **B**
- (6) None of the rules provided that the outstanding amount due on a margin account would be irrecoverable due to an infringement of the rules. Thus even if the rules had been infringed the amount would still be recoverable (see p 64G). **C**
- (7) Since the respondent was not in breach of any of the rules, there was no breach of fiduciary duty (see p 64F). **D**
- (8) The question was whether the affidavits filed by the appellant survive the critical examination which must be done. None of the affidavits or exhibits made any of the issues triable (see p 64H-I). **E**

[Bahasa Malaysia summary]

Responden telah menuntut terhadap perayu kerugian dan faedah dagangan yang dikenakan oleh perayu dalam kemudahan kewangan margin syer dengan responden. Perayu menuntut bahawa responden telah melanggar kewajipan fidusiari yang menjadi tanggungjawab responden kepada perayu. Perayu menghujahkan bahawa responden telah gagal untuk memberikan satu huraian dagangan dan harga-harga yang diakibatkan oleh kurangan tersebut dan oleh itu perayu tidak mengetahui bagaimana jumlah yang dituntut tersebut dikenakan. Perayu selanjutnya menghujahkan bahawa memandangkan beliau juga mempunyai akaun dagangan dan juga akaun margin, responden telah gagal untuk mematuhi Pekeliling KLSE 713 dan Peraturan-Peraturan Dagangan Akaun-Akaun Margin yang terpakai ke atas perayu. Responden telah gagal untuk menghapuskan margin tersebut apabila ekuiti jatuh di bawah paras 130%. Responden juga telah menetapkan nilai ekuiti pada 50% pada nilai pasaran yang bertentangan dengan nilai yang berdasarkan harga tutup terakhir pada hari sebelumnya. Perayu mendakwa bilangan affidavit-afidavit benar-benar menunjukkan bahawa ini bukan satu kes yang jelas dan mudah untuk penghakiman terus. Mahkamah bawahan memberikan penghakiman terus kepada responden. Perayu membuat rayuan. **F**

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A **Diputuskan**, menolak rayuan tersebut:

- B** (1) Responden telah mengekshibitkan satu set laporan analisa margin pelanggan yang menetapkan bagaimana angka-angka tersebut didapati dan melalui transaksi-transaksi syer yang mana, termasuklah pengenaaan faedah (lihat ms 61C–D). Walaupun dengan anggapan kejahilan perayu boleh menjadi satu pembelaan, ekshibit-ekshibit tersebut membuktikan transaksi-transaksi dan kurangn tersebut dan hendaklah tidak meninggalkan apa-apa keraguan bagaimana perayu akhirnya berhutangkan wang yang dituntut (lihat ms 61G).
- C** (2) ‘Kurangan yang tidak berbayar yang dikenakan sebagai akibat daripada dagangan pelbagai syer dan stok’ adalah tidak berbeza daripada ‘telah gagal dalam membayar balik responden untuk bayaran-bayaran pendahuluan untuk pembelian pelbagai syer-syer yang kemudiannya telah dihapuskan. Kedua-duanya menyatakan perkara yang sama dalam bentuk yang berbeza (lihat ms 61D–F).
- D** (3) Responden telah menyaman perayu bukan atas akaun dagangan tetapi atas akaun margin dan oleh itu pekeliling 713 tidak terpakai (lihat ms 62A). Peraturan 20(15) memberikan responden budi bicara mutlak sama ada untuk membuat jualan paksa atau tidak. Oleh itu satu kegagalan untuk menghapuskan tidak boleh menjadi satu pembelaan kepada tuntutan tersebut (lihat ms 62F–I).
- E** (4) Dengan hanya mempli satu pelanggaran peraturan tidak boleh menjadi satu pembelaan kecuali ia juga diplikan bahawa pelanggaran tersebut mengakibatkan perjanjian tersebut tidak sah dan kurangan tersebut tidak boleh ditebus. Hujah perayu bagaimanapun adalah hanya bahawa pelanggaran peraturan tersebut telah mengakibatkan beliau mengalami kerugian kontra yang besar (lihat ms 62I–63B).
- F** (5) Peraturan 20(12) dan (13) menghendaki seorang pelanggan untuk ‘mengisi satu kurangan agar dapat membawa ekuiti tidak kurang daripada 150% daripada baki yang belum dijelaskan’. Jika ia tidak salah di segi undang-undang untuk responden memberikan peratusan yang lebih tinggi untuk ekuiti, maka ia tidak kira bahawa syer-syer tersebut diberikan pada nilai yang rendah memandangkan kesan yang sama akan diperolehi (lihat ms 64D–E).
- G** (6) Tiada mana-mana daripada peraturan tersebut memperuntukkan bahawa jumlah yang belum dijelaskan pada akaun margin tidak boleh ditebus disebabkan oleh pelanggaran peraturan tersebut. Oleh itu walaupun peraturan tersebut telah dilanggari jumlah tersebut masih boleh ditebus (lihat ms 64G).
- H** (7) Memandangkan responden tidak melanggar apa-apa peraturan, maka tiada pelanggaran kewajipan fidusiari (lihat ms 64F).
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(8) Persoalan sama ada affidavit-afidavit yang difailkan oleh perayu beerjaya mengharungi pemeriksaan kritikal yang perlu dilakukan. Tiada mana-mana daripada affidavit-afidavit atau ekshibit-ekshibit tersebut yang menjadikan mana-mana daripada persoalan tersebut boleh dibicarakan (lihat ms 64H-I).]

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Notes

For cases on stockbroker, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 791-792.

C

Cases referred to

Associated Bulk Carriers Ltd v Koch Shipping Inc [1978] 1 All ER 253 (refd)

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Legislation referred to

Rules of Trading On Margin Account r 20, (8), (12), (13), (15)

David Lim (Wan Ullok Jugah Chin & Co) for the appellant/defendant.
Lau Geok Tin (SK Ling & Co) for the respondent/plaintiff.

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Ian Chin J:

Introduction

Summary judgment was granted by the lower court on 18 February 2000. The respondent/plaintiff's claim against the appellant/defendant is for the sum of RM139,024.65 made up of RM138,830.67 for trading losses and RM193.98 for interest incurred by the defendant during the period 24 December 1997 to 12 March 1998 in respect of trading losses which the plaintiff had financed through a share margin financing facility of up to the maximum amount of RM500,000.

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From what Mr David Lim learned, counsel for the appellant/defendant had said I would sum up the defence as being:

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- (1) the respondent/plaintiff had been put to prove their claim;
- (2) the respondent/plaintiff had failed to comply with the Kuala Lumpur Stock Exchange Circular No 715 and Rules of Trading relating to margin accounts; and
- (3) that the plaintiff/respondent had, consequent to the said failure, breached the fiduciary duty owed to the appellant/defendant. In the lower court, learned counsel had raised nine issues as justifying the case going to trial. The lower court did not agree and gave summary judgment. Since not all of the issues are canvassed before me, I will assume that those that are not mentioned before me have been abandoned.

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A *The contentions*

As for defence (1), it was contended that there was a failure by the respondent/plaintiff 'to give any breakdown or detail of the claim as to how it was arrived at', that is that there were no details of the trading and the prices that resulted in the shortfall. For this purpose the case of *Associated Bulk Carriers Ltd v Koch Shipping Inc* [1978] 1 All ER 253 was cited. That case concerned a repudiation of a charter party where the market rate for the vessel had fallen. Damages for wrongful repudiation amounting to \$4m representing 27 months' hire less the hire obtainable under a time charter for that period as at the date of repudiation was claimed and summary judgment was applied for. The defendant admitted liability but denied that the plaintiff was entitled to the amount claimed. The court there by a majority held that it was impossible to identify or quantify any particular part of their claim which was indisputably due or in respect of which there was no defence. The lower court was asked to select a sum to give judgment for on the basis of two figures. That case has nothing to do with margin trading and is of no help to the defendant/appellant. The present case is concerned with trading losses which is a simple matter of calculation reckoned by taking the difference between the purchase price and the sale price of the sales and these are identifiable and quantifiable. This leads me to the question of whether the plaintiff had identified and quantified the same. The plaintiff/respondent had exhibited a set of documents called 'Margin Client Analysis Report' (ED-6) which set out in detail how the various figures are derived and through what shares transactions, including the imposition of interest. There is clearly no defence here. It was also contended that the affidavit had enlarged the pleaded claim. The statement of claim had adverted to 'unpaid shortfall which was incurred as a result of trading in various shares and stocks' pursuant to a share margin financing facility granted by the respondent/plaintiff. It was argued that this is different from 'having defaulted in reimbursing the plaintiff of payments advanced on his behalf in the purchase of various shares which were subsequently disposed either by forced sale or on the defendant's instructions, in particular, Kim Hin and Nepline shares'. In my view, those statements are merely expressing the same thing in different ways. They both relate to the share margin financing facility under which the appellant/defendant traded and lost and under which agreement the appellant/defendant must pay or repay or reimburse, which term one prefers, the respondent/plaintiff whatever is owing or whatever shortfall under the account. It is an allegation that is one and the same concerning the same claim. As justifying a trial was the allegation of the appellant/defendant that 'he does not know how he ended up owing the respondent' the sum claimed. Even assuming that such ignorance could be a defence, the exhibits establishing the transactions and the shortfall should leave him in no doubt as to how he ends up owing the sum.

I Defence (2) calls for an examination of the Kuala Lumpur Stock Exchange Circular No 713 and Rules of Trading relating to margin accounts. In so far as Circular No 713 is concerned, it is conceded though grudgingly that it does not apply to margin accounts but only to a trading

account but Mr David Lim, learned counsel for the appellant/defendant, went on to contend in these words:

It subsequently transpired that the appellant had a trading as well as a margin account with the respondent — this was admitted by the respondent in the affidavit-in-reply of Edward Lim affirmed on 12 July 1999.... Therefore, as far as the appellant is concerned both Circular No 713 and the Rules of Trading apply in the respondent's handling of his accounts.

The short answer to that contention is that the respondent/plaintiff is suing not on the trading account but on the margin account and therefore Circular No 713 had no application.

It remains to be examined whether the respondent/plaintiff had 'failed to conduct the appellant's account properly and in compliance with the Rules of Trading, in particular, r 20'. This defence is pleaded in the following terms:

3A Further or in the alternative the defendant avers that the plaintiff had failed to comply with the Rules of Trading pertaining to margin accounts and had thereby caused the defendant to suffer heavy contra losses.

PARTICULARS

[Details of purchases and force-sales were set out]

This defence was then elaborated by the affidavits and submission of learned counsel. The appellant/defendant said that the rules had been breached as the respondent/plaintiff had:

- (i) failed to ask for a topping up of the account within three days after a shortfall had occurred;
- (ii) allowed new purchases despite that shortfall;
- (iii) failed to liquidate the margin when the equity fell below 130%; and
- (iv) fixed the value of the equity at 50% of the market value as opposed to a value based on the last done price on the preceding day.

As for (i), when the respondent/plaintiff adduced evidence of the requests for topping up having been made, the appellant/defendant replied that because the transactions were so numerous it was impossible to tell when the margin fell below 150% and when he was requested to top up his account. That cannot constitute an answer to the positive assertion that there were those requests made. As for (ii), it was not a matter raised in the lower court and neither did learned counsel point to the particular evidence as showing that there were new purchases despite the shortfall. As for (iii), r 20(15) of the Rules of Trading On Margin Account allows the respondent/plaintiff an absolute discretion whether to force-sell or not. That rule is in these terms:

In the event that the equity falls below 130 per centum of the outstanding balance, the member company shall have absolute discretion and without notice to its client, liquidate his margin account including the securities purchased and carried in such account, so that the equity is not less than 150 per centum of the outstanding balance.

- A** This provision is incorporated in cl 8 of the agreement made between the appellant/defendant and the respondent/plaintiff. Therefore, the failure to liquidate the margin account cannot be a defence to the claim.

As for (iv), it was contended that the Rules of Trading had been infringed when the value of the equity was under the agreement fixed at 50% of the market value instead of the value based on the last done price on the preceding day. Merely pleading contravention of the said rules would not be a defence unless it is also pleaded that the infringement rendered the agreement illegal and the shortfall unrecoverable. That is not the case of the appellant/defendant. His complaint is that the infringement of the rules has resulted in him suffering heavy contra losses because it enabled the respondent/plaintiff to force-sell the shares which they would not be able to do so if the proper value, the last done price of the preceding day, had been assigned to the shares. Rule 20(8) provides:

The collateral that a client may deposit into his margin account and the method of valuation thereof shall be limited to the following:

- D** (a) For securities quoted on the Exchange and other stock exchanges recognized by the Exchange, the value shall be based on the last done price of the securities on the preceding market day;
- (b)

- E** The various definitions given by the agreement made between the parties and relevant for consideration are 'market value', 'margin', 'equity' and 'required security value' and they are in these words:

- F** 'Market value' (hereinafter referred to as 'MV') means the last transacted price for which the securities in question are transacted on the Kuala Lumpur Stock Exchange (hereinafter referred to as 'the KLSE') on the day preceding that on which the MV is to be determined hereunder or if such securities ceased to be quoted or traded thereon such other exchange as Sarawak Securities may determine and in the case of any securities which cease to be quoted or traded on any stock exchange acceptable to Sarawak Securities on whose quotation is suspended for more than seven days (other than for purpose of temporary suspension pending announcements) the MV shall be deemed to be zero.

- G** 'Margin' means the aggregate amount of collaterals in the form of cash and securities (valued at not more than 60% of the market value) deposited into the margin account but excludes securities which are purchased and carried in the margin account.

- H** 'Equity' means the sum of margin and securities purchase or carried in the margin account (valued at 50% of the current market value).

- I** 'Required security value' (hereinafter referred to as 'RSV') means the equity which shall not be less than 150% of the outstanding balance in the margin account.

As for the RSV the respondent/plaintiff had reserved to themselves to vary that percentage to any rate and this was varied by the offer to be not less than 200% of the outstanding balance in the margin account. The agreement provides the respondent/plaintiff with the right to demand topping-up of the collateral if the value is less than the RSV. The

consequence of all those provisions is that the shares pledged as collateral and shares purchased using the margin account are not given their full value but instead, respectively, 50% or 60%. This has the result of allowing the respondent/plaintiff the cushion of the fall, corresponding to the said percentages, in the value of the shares and consequently the value of the security. The cushion is further padded by the requirement that the RSV should not be less than 200% of the loan margin. It is true, as contended by learned counsel for the respondent/plaintiff, that this results in an artificial liquidity deficit which would otherwise not have been the case if the shares were given the true instead of the discounted value. Is the respondent/plaintiff entitled to do that? What the respondent/plaintiff need simply do if it wants a very good cushion in respect of the use of the shares as collateral would be to demand a higher margin for the RSV to be not less than the equity without bothering to depress the value of the shares to the said percentages of 50% or 60%. For example, instead of setting the margin of the equity at being not less than 150% of the outstanding balance, it could be set at 210% and the same can be adjusted from time to time as the agreement allows the respondent/plaintiff to do so. Therefore, it does not matter that the market value of the shares had been given a depressed value as a result of the definition, thus giving a much higher RSV because the same result can be obtained by providing for a higher percentage for the equity to be not less than the balance outstanding. If it is not wrongful to do the latter, it cannot be so in respect of the former since the same result would be obtained. Therefore, I need only examine whether the former is prohibited. In this regard, the Rules of Trading are clear. Rule 20(12) and (13) required a client 'to top up the shortfall so as to bring the equity to not less than 150 per centum of the outstanding balance'. The words used are 'not less than'. It sets a minimal percentage but it does not prohibit any percentage higher than 150%. Therefore, when the respondent/plaintiff made the various provisions which I have referred to which result in a margin higher than 150%, they were perfectly within their right to do so and they had not infringed any Rules of Trading. There is also no issue for trial in this point.

Consequently, there is no question of breach of fiduciary duty on the part of the respondent/plaintiff (defence (3)) since they are not in breach of any of the rules. In so far as the failure to force-sell as constitutes a breach of the fiduciary duty, the unrefuted evidence is that it was the appellant/defendant who requested the same. In any event, the Rules of Trading gave an absolute discretion to decide whether and when to force-sell without giving any notice. There is also no merit in this contention.

It must be pointed out that none of the Rules of Trading relied on by the appellant/defendant contains provisions making the outstanding balance due on a margin account irrecoverable if there are infringements of the rules. This means, even if there had been an infringement, which I have concluded there is none, the amount due from the appellant/defendant is still recoverable by the respondent/plaintiff.

Counsel for the appellant/defendant had also contended that the sheer number of the affidavits filed, totalling 12, shows that 'this is not a plain and

- A** obvious case' for summary judgment. That cannot be a correct proposition as it leads to the situation where in order to avoid summary judgment you need only pile on the affidavits. The matter, in my view, depends very much on whether the affidavits filed on behalf of the appellant/defendant can survive a critical examination as it is trite law that such an examination must be conducted. This had been done and none of the said affidavits or exhibits thereof makes any of the issues triable.
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Conclusion

- In the premises, the appeal is dismissed with costs to the respondent/plaintiff. I do not propose to go into the preliminary objection of the respondent/plaintiff that the appeal was incompetent because certain documents were not included and were not sealed or certified copies since the respondent/plaintiff had succeeded on the merits. A decision on the preliminary point would have to be postponed till after the disposal of the appeal against the decision of the Court of Appeal concerning the points raised in the preliminary objection. I instead heard the appeal on merit as well to avoid postponing this appeal which would not be necessary if my decision is in favour of the respondent/plaintiff on merit, as is the case as events turn out.
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Appeal dismissed with costs.

- E** Reported by Andrew Christopher Simon
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